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**ARGUMENT**—Continued.

AUTHORITIES CITED.

# In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, *v.* THE PENNSYLVANIA RAILROAD COMPANY. — No. 340.

THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND THE CREW-LEVICK COMPANY, APPELLANTS, *v.* THE PENNSYLVANIA RAILROAD COMPANY. — No. 341.

*APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASES.

These cases involve the power of the Interstate Commerce Commission to require railroads to provide and furnish, upon reasonable demand, an adequate number of cars for interstate transportation. They present to this court for decision for the

first time the question whether violation of the established duty of a common carrier to provide and furnish cars may be remedied by order of the Commission, or solely by suit in the courts.

The two cases are appeals by the United States from interlocutory injunctions issued by the District Court of the United States for the Western District of Pennsylvania on November 13, 1915 (R. 58, No. 341; 227 Fed. 911) enjoining the enforcement of an order of the Interstate Commerce Commission of May 11, 1915, which was as follows (R. 35, 36, No. 341; 34 I. C. C. 179):

> It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.
>
> It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

> And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

The decision of the District Court went wholly on the merits and was based on the want of jurisdiction of the Commission. The appeal by the Government from the interlocutory injunction, therefore, is proper. Act approved October 22, 1913, c. 32, 38 Stat. 208, 220; *Pipe Line Cases*, 234 U. S. 548, 558; *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1, 10.

THE STATUTES.

The assertion of jurisdiction by the Commission is based particularly upon the following portions of the Act to Regulate Commerce as amended in 1889, 1906, and 1910. Section 1 of the act as amended June 29, 1906, c. 3591, 34 Stat. 584, and June 18, 1910, c. 309, 36 Stat. 539, 545, provides:

> * * * and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor * * *.

> And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

Section 12 of the act as amended March 2, 1889, c. 382, 25 Stat. 855, 858, provides:

> * * * and the commission is hereby authorized and required to execute and enforce the provisions of this act.

Section 15 of the act as amended (36 Stat. 551) provides:

> That whenever, after full hearing upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist,

and shall not thereafter publish, demand or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. * * *

* * * * *

(p. 554) The foregoing enumeration of powers shall not exclude any power which the commission would otherwise have in the making of an order under the provisions of this act.

THE FACTS.

The facts in the two cases are substantially the same. The cases were treated as one before the Commission and before the District Court. In addition to the facts set forth in the record in No. 340, it appears in No. 341 that the Crew-Levick Company obtained leave to intervene and filed answer, stating that it had become successor to the Pennsylvania Paraffine Works, and that the effective date of the Commission's order had been postponed for three months, or until November 15, 1915. Page references, unless otherwise noted, will be to the record in No. 341.

Transportation of oil in the United States is a bulk industry. The total of 250,000,000 barrels of crude oil annually produced in the United States is moved by pipe line, in barrels and tank cars. By far the greater portion of the refined oil, or 91 per cent, is shipped in tank cars. It is the customary

practice of railroads generally to transport oil in bulk, by means of tank cars. The Commission found:

> * * * For a long time the bulk of the refined product has been shipped in tank cars, and at present 91 per cent of the refined oil produced in this country is transported in this manner.
>
> * * * The tank cars now in common use for the transportation of oil have a capacity of from 6,000 to 12,000 gallons each. The cars are so constructed that they may be rapidly loaded at the refinery, and jobbers and dealers in the refined product throughout the country have the proper and necessary facilities for unloading tank cars by gravity at their various stations. Even the country grocer has his tank, which is filled from tank wagons. The tank wagons are filled from the oil dealer's storage tank, which in turn is filled from tank cars. (R. 20.)
>
> The bulk of the movement of refined oil is in tank cars owned by the shippers. * * * The privately owned tank cars east of the Mississippi aggregate about 27,700, and the total number of tank cars owned in the United States was given as approximately 40,000. (R. 20, 21.)

The Commission made a finding that the railroad holds itself out to transport oil in tank cars. It publishes rates for the transportation of oil in tank cars, owns tank cars and leases them, and the rates published apply to shipments both in cars owned and leased (R. 26). It has been using such cars

for over 25 years (R. 20). The Commission said (R. 26, 27):

> As bearing upon this point, it should first be stated that defendant holds itself out to transport oil in bulk. It not only publishes rates for the transportation of oil in tank cars, but owns tank cars and supplies shippers with them. It leases cars owned by companies engaged in refining oil and transports their products in those cars at the rates it publishes for the movement by rail of oil in tank cars. It certainly can not be contended that the transportation by rail of oil in bulk could be attempted safely in any equipment other than tank cars.
>
> (R. 20) * * * In 1887 the Pennsylvania Railroad acquired 1,308 tank cars, some of which have subsequently been sold to independent refineries. Defendant now owns 499 tank cars, all that remain of those purchased in 1887, and 482 of which are furnished to shippers of oil located on its lines. The other railroads east of the Mississippi River own, in the aggregate, only 303 tank cars.

Tank cars for the transportation of refined products are a commercial necessity. The cost of transportation in barrels is prohibitive, and the shipper compelled regularly to use barrels must shortly go out of business. Quoting again from the Commission's report (R. 20):

> The only other method of transporting oil by rail is in barrels or similar containers loaded in box cars. However, the cost to the purchaser of oil transported in barrels is from $3\frac{1}{2}$

> to 3¾ cents per gallon above the cost when transported in tank cars. * * * The price of lubricating oil is from 2½ to 22 cents per gallon f. o. b. cars at complainants' works; that of burning oil from 4½ to 5¾ cents per gallon, and of gasoline from 9½ to 17½ cents. It is evident that the addition of 3½ cents per gallon to the cost of oil when transported in barrels makes that method of transportation prohibitive and that the refusal of the railroads to furnish an adequate supply of tank cars would tend to drive out of business refiners who are unable to supply themselves with enough tank cars to move their products. Even witnesses who appeared in defendant's behalf admitted that tank cars are an absolute necessity for the transportation of refined products, and that their use effects an economic gain.

The movement of petroleum in tank cars is not a dangerous operation, and preparation of the cars therefor requires no peculiar technical knowledge (R. 32, 33).

The Crew-Levick Company and the Pennsylvania Paraffine Works are refiners of crude oil, with works at Warren, Pa., and at Titusville, Pa., respectively, both located on the line of the Pennsylvania Railroad Company. They have ample sidings and connections with defendant's railway for the delivery and loading of tank cars (R. 20). The Pennsylvania Paraffine Works during 1913 and 1914 had been refining about 20,000 barrels of crude oil per month, and the Glade Oil Works, operated by the Crew-

Levick Company, from 15,000 to 16,000 barrels per month. In 1913 the shipments from the Pennsylvania Paraffine Works averaged over 750,000 gallons per month, 91 per cent of which moved in tank cars, 1½ per cent in barrels, and 7½ per cent in pipe lines. During the same period, of the shipments from the Glade Oil Works, amounting to over 500,000 gallons per month, 86.8 per cent were in tank cars, 4.7 per cent in barrels, and 8.5 per cent in pipe lines (R. 19).

On March 9, 1910, the Pennsylvania Paraffine Works demanded of the railway company tank cars necessary for the transportation of its product. The railroad furnished cars but in insufficient number. On November 11, 1912, the Pennsylvania Paraffine Works by formal notice requested of the defendant sufficient tank cars to ship 450,000 gallons of oil per month, and the Crew-Levick Company requested sufficient to ship 600,000 gallons per month. To these requests the railroad company answered as follows (R. 21):

> "We beg to say that the railroad company is not prepared to increase its present tank-car equipment, but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair and reasonable and nondiscriminatory."

The refiners thereafter filed complaints with the Interstate Commerce Commission alleging that the supply of oil tank cars furnished by the railroad was inadequate and praying for an order requiring the railroad to furnish cars as requested. The Commis-

sion, after extended hearing, found that the equipment provided and the cars furnished were inadequate and in violation of the legal duty imposed by the Interstate Commerce Act as amended. Jurisdiction to make the order now in question was examined and sustained. Three commissioners dissenting were of opinion that relief must be sought in the courts.

It appeared that the destinations of practically all of the refiners' shipments were points on the line of the railroad company (R. 21). The Commission pointed out that the order did not necessarily require the purchase of tank cars by the railroad company, but that they might be leased from private car lines if deemed desirable (R. 33).

The railroad on July 3, 1915, filed a petition to enjoin the enforcement of the order (R. 2, 6), contending that there was no duty either at common law or under the statute to furnish oil tank cars; that even if there were such legal obligation the Commission was not empowered to enforce it by order. Various subordinate objections to the order were made: (*a*) That it required sending of the railroad's cars to points beyond its own lines; (*b*) that the order was uncertain and indefinite; (*c*) that the order required tank cars owned by other refiners to be furnished to complainants; (*d*) that too short a time for compliance was granted. The railroad made no attack before the District Court upon the Commission's findings of fact.

The majority of the District Court held in accordance with the principal contentions of the railroad

company. (R. 46; 227 Fed. 911.) Thomson, district judge, delivered an able dissenting opinion (R. 54). The majority reasoned that prior to 1906 there was no statutory duty on the part of the railroad to furnish oil tank cars, and that the amendment of 1906 did not enlarge the railroad's obligations or the Commission's powers in this respect. The court said (R. 53):

> * * * Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them, then to acquire them, whether they had the money or not. Restricting our construction of the act to its words and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906 including cars within the definition of "transportation" added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission and vested in the Commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, *then the practice of the carrier found unlawful in this case was not in violation of the statute,* and the order of the Commission directing the carrier to desist from that practice was an exercise of power not conferred by law. [Italics ours.]

### SPECIFICATIONS OF ERROR.

By assignments of error in various forms the Government raises for review the correctness of the rulings and decree of the District Court (R. 60–63). The Government contends that the railroad in this case was under a common-law obligation to furnish oil tank cars upon reasonable request; that since 1906 the statute has imposed the same obligation; and that the order in this case was within the powers of the Commission conferred by the Act to Regulate Commerce as amended. It is further contended that the various minor objections to the order are without merit. The principal issue, therefore, is: Has the Interstate Commerce Commission jurisdiction under the Act to Regulate Commerce as amended to order a common carrier subject to its provisions to provide and furnish upon reasonable request cars such as the carrier is accustomed and holds itself out to furnish?

### BRIEF OF ARGUMENT.

I. The railroad is under a legal duty to furnish oil tank cars upon reasonable request.

1. The common law imposes the duty.

(*a*) The obligation of the railroad is not simply to devote its specific property on hand to the public use, but to render adequate transportation service.

(*b*) Additional equipment must be provided if necessary to accommodate reasonable public demands.

(*c*) Special facilities such as tank cars must be provided even though previously the railroad has not held itself out so to do.

(*d*) The railroad at bar, however, has held itself out specifically to carry oil in tank cars.

2. The duty is clearly imposed by the Hepburn Act of 1906.

(*a*) Recent decisions in this court recognize the obligation imposed.

(*b*) The evil to be remedied by the amendment of 1906 was in part the public injury due to insufficiency of the railroad's supply of tank and refrigerator cars.

(*c*) The history of the amendment of 1906 in the Halls of Congress shows that it was designed to meet this evil.

(*d*) The violation of legal duty in these cases is established.

II. The Interstate Commerce Commission has power to order the carrier to comply with a reasonable request to furnish oil tank cars.

1. The amendment of 1906 conferred upon the Commission power to make the order in question.

2. The amendment of 1910 serves to remove all doubt.

(*a*) Section 15 expressly empowers the Commission to issue orders prescribing any regulations or practices whatsoever in respect to transportation.

(*b*) The order in these cases deals with a regulation or practice under section 15, as amended.

(*c*) The order was within the jurisdiction of the Commission even if not strictly a practice.

3. The question whether the duty to provide and furnish cars is violated is administrative, and uniform control by the Commission is requisite.

4. Control by the Commission is imperatively required if the purpose of the act to prevent discrimination is to be effectuated.

5. The order involves the exercise of no new or unusual power by the Commission.

III. The order is not subject to the objection that it compels the use of cars beyond the line of the railroad.

IV. The order is not void because indefinite or uncertain.

V. The order does not require an unlawful interference with the rights of owners of private cars.

VI. The order afforded sufficient time for compliance.

## ARGUMENT.

### I.

### The railroad is under a legal duty to furnish oil tank cars upon reasonable request.

**1. The common law requires the common carrier to furnish reasonably adequate facilities for the transportation of the class of goods which it professes to carry.**

"The first duty of the common carrier, who holds himself out to the public as ready to engage in the carrying business, is of course to provide himself with reasonable facilities and appliances for the transportation of such goods as he holds himself out as ready to undertake to carry. He must put himself in a

situation to be at least able to transport an amount of freight of the kind which he proposes to carry equal to that which may be ordinarily expected to seek transportation upon his route; for, while the law will sometimes excuse him for delay in the transportation, and even for a refusal to accept the goods which may be offered for carriage, when there occurs an unprecedented and unexpected press of business, it will not do so when his failure or refusal results from his not having provided himself with the means of present transportation for all who may apply in the regular and expected course of business." Hutchinson on Carriers, 3d ed., sec. 495. See Beale and Wyman, Railroad Rate Regulation, 2d ed., sec. 930.

In *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, in condemning a special yardage charge for the delivery of live stock in stock yards, the court said:

> (p. 133) The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public.

> (p. 135) * * * The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered.

**(a) The obligation of the railroad is not simply to devote its specific property on hand to the public use, but to render adequate transportation service.**

The vital question is, as said in the *Covington* case, *supra*, whether the facilities furnished "are sufficient for the reasonable accommodation of the public." It is true that at the early common law the coachman was excused for failure to carry if his coach was full. *Lovett* v. *Hobbs*, 2 Shower 127; *Riley* v. *Horne*, 5 Bing. 217. A railroad need not carry beyond its own line.[1] See *Michigan Central R. R. Co.* v. *Mich. R. R. Comm.*, 236 U. S. 615, 631. Also it may limit its undertaking to certain great classes; thus, it may carry passengers and refuse to accept freight. But, having undertaken to carry freight generally, it cannot refuse a particular commodity, such as, for example, oil. See Wyman Public Service Corp., secs. 253, 260; also cases cited, *infra*, pp. 23, 24. In every case the law imposes upon the person who engages in a public service business the obligation to live up

[1] Similarly, a shipowner need not provide additional ships although his vessels are insufficient to carry all goods tendered. *Ocean Steamship Co.* v. *Savannah Supply Co.* 131 Ga. 831. But he must provide modern equipment on the ships furnished, for example, refrigeration facilities for shipment of meats. *The Southwark*, 191 U. S. 1, 9.

to the undertaking. And it is now well recognized that the undertaking of the modern railroad enforced by the courts in absence of statute is to serve reasonably the reasonable transportation needs of the community. As said in Wyman on Public Service Corporations, sec. 797:

> In most of the public employments of the modern type what is undertaken is not merely the devoting of particular equipment to public use but rather the rendering of a certain service to the community with which it professes to deal. Thus a modern railroad plainly undertakes general transportation along its route; and since it has professed this general service it must see to it that it has sufficient equipment to handle the business which it has in effect invited by this general profession.

The duty to respond to increased demands such as are reasonably to be foreseen follows from the conceded duty of a carrier to carry, and to carry without discrimination. The obligation to carry would often prove vain, if sufficient excuse for failure were that the railroad had no cars available; and it would be easy to furnish such cars as were possessed to the favored shipper only. The necessities of the public in view of the railroad's usual monopoly are sufficient reason for the common law requirement. Competitors are not at hand to supply deficiencies. It is plain, moreover, that the obligation is not simply to furnish safe cars, as the appellee contended below. For the carriage of goods, the requirement is that cars be both safe and in sufficient number.

The general obligation of any public utility company is not to devote specific property to the use of the public but to furnish adequate service. Thus a water company has been compelled by mandamus to extend its water mains upon reasonable request. *Lukrawka* v. *Spring Valley Water Co.*, 169 Cal. 318, 329–332. See *Haugen* v. *Albina Light & Water Co.*, 21 Oreg. 411; *Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, 659. Similarly, a telegraph company must increase its telegraph lines (*Leavell* v. *Western Union Telegraph Co.*, 116 N. Car. 211, 221); and a telephone company its telephone service (*United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. 66) if the reasonable business necessities demand. In the telephone case the court said (p. 71):

> * * * Every such charter contemplates that conditions will change from year to year and from decade to decade, and that the obligation of the company shall be to give that service, which, at the future time when the question arises, is then, and in view of the conditions then existing, reasonably adequate.

**(b) Additional equipment must be provided if necessary to accommodate reasonable public demands.**

The significance of the often recurring statement that the common carrier has excuse for failure to furnish cars by reason of unexpected press of business not reasonably to be foreseen, is that if the business could have been foreseen, and could reasonably have been provided for, the excuse does not avail. In many cases enforcing the common-law obligation this has been squarely held.

In *Yazoo and Miss. Valley R. R. Co.* v. *Blum Company*, 88 Miss. 180, a suit for failure to transport cotton, a plea of lack of adequate facilities was held bad on the ground that there was no averment of any effort to provide adequate equipment for properly handling a normal and expected crop. The court said, approving the language in 5 Am. and Eng. Encyc. (pp. 191, 192):

> * * * But in the case of railroad and similar companies endowed with special and unusual powers, with the express view to their rendering to the public a freight and passenger service adequate to the needs of the country through which their lines pass, the law imposes the obligation to have and to furnish sufficient facilities for the reasonably prompt transportation of the goods tendered for carriage, and they are liable for a failure to transport promptly whether the failure is due to a want of facilities or to a captious refusal to carry.

In *Illinois Central R. R. Co.* v. *River and Coal Co.*, 150 Ky. 489, damages for failure to furnish an adequate number of coal cars were recovered. The railroad's supply of coal cars was held inadequate to meet "the demand [which] was not more than the company should reasonably have anticipated and prepared to meet at the season of the year when this controversy arose" (p. 493). The court said (p. 491):

> * * * by failing to furnish an adequate number of cars for the transportation of coal, the railroad company has power to not only

> injure or destroy the property of the mine owner, but to largely increase the price of coal to the consumer by failing to put on the market the amount of coal necessary to meet the demands of the trade.
>
> At common law the carrier was bound to provide reasonable facilities and appliances to transport such goods as it held itself out ready to carry.

In *Branch* v. *Wilmington &c. R. R. Co.*, 77 N. Car. 347, the excuse for failure to transport promptly by reason of a great press of business in shipping through cotton was held unavailing, where it appeared that the increased business was to have been foreseen and cars could have been obtained. The court said (p. 350):

> A common carrier (especially one having a monopoly of the carriage) who invites the public custom is bound to provide sufficient power and vehicles to carry all the goods which his invitation naturally brings to him.

In *Ocean Steamship Co.* v. *Savannah Supply Co.*, 131 Ga. 831, where a carrier was enjoined from providing unreasonably inadequate facilities for lumber while furnishing them for cotton, the court said (pp. 836, 837):

> * * * he [the ship owner] is under no obligation to provide other ships because his vessel is inadequate to transport all goods which may be offered him. Such a carrier does not owe to the public all the duties imposed by the law on railroad companies and similar public institutions to furnish adequate transportation facilities for all goods which may be tendered.

> Railroad companies are public institutions, and are granted certain exclusive franchises and rights which naturally impose correlative duties. * * * The conference of these unusual powers raises an obligation not only to serve the public impartially, but to serve the public efficiently. Upon them the law imposes the obligation to furnish sufficient facilities for the reasonably prompt transportation of goods tendered for carriage; and they are bound to provide sufficient cars for transporting, without unreasonable delay, the usual and ordinary quantity of freight offered to them, or which might reasonably and ordinarily be expected.

In *Cobb* v. *Illinois Central R. R. Co.*, 38 Iowa 601, damages were recovered for failure to carry grain. The court held that an instruction was properly refused which was to the effect that additional tracks and warehouses need not be provided to meet an unprecedented rush of business, saying (p. 623):

> * * * It [a common carrier] is bound to do all that is reasonable, to use all reasonable means to accommodate its increased business.

In *People* v. *St. Louis &c. Railroad Company*, 176 Ill. 512, the court compelled new separate passenger train service to be furnished, holding that the common-law duty to provide adequate transportation was sufficiently specific to justify relief by mandamus.

(c) **Special facilities such as tank cars must be provided even though previously the railroad has not held itself out so to do.**

From the obligation to render adequate transportation service in general it follows that the railroad must furnish special facilities if required by reasonable business demands. Although in the early cases the duty of the carrier to furnish stock cars for the transportation of cattle was denied, it is now universally recognized. *Kansas Pacific Ry.* v. *Nichols*, 9 Kans. 235; *R. R. Co.* v. *Pratt*, 22 Wall. 123; *Covington Stock-Yards Co.* v. *Keith*, *supra*. Similarly, as held in *Baker* v. *Boston & Maine R. R. Co.*, 74 N. H. 100, 110, special milk cars must be offered where—

> large quantities of milk were produced by individual farmers living along the line of said defendant's railroad. The quantity was such that it was more economical and more advantageous to all parties—producers, distributors and consumers—to have it transported in special cars furnished with icing facilities than to have it carried in ordinary cars.

Coal cars must be furnished for the transportation of coal. *Loraine* v. *Pittsburg &c. R. R. Co.*, 205 Pa. St. 132. The duty to furnish refrigerator cars has been enforced in suits for damages for failure to supply them. *Atlantic Coast Line R. R. Co.* v. *Geraty*, 166 Fed. 10; *Mathis* v. *Southern Ry.*, 65 S. Car. 271. In the *Mathis* case the railroad company failed to furnish refrigerator cars for the transportation of canteloupes, and the plaintiff shipper was compelled to ship by ex-

press. Recovery was allowed for the difference between the cost of shipment by express and by the refrigerator cars. Refiners of oil compelled to ship oil in barrels would seem to have similar remedy at common law.

The duty to furnish oil tank cars has been specifically recognized in *State* v. *Railway Co.*, 47 Ohio St. 130, a quo warranto proceeding in which a discriminatory rate against shipments of oil in barrels in favor of shipment of oil in private tank cars was condemned. The court said (p. 139, 140):

> * * * It was the duty of the defendants to furnish suitable vehicles for transporting freight offered to them for that purpose, and to offer equal terms to all shippers. * * * The fact that one shipper may be provided with vehicles of his own, entitles him to no advantage over his competitor not so provided. The true rule is announced by the Interstate Commerce Commission, in the report of the case of *George Rice* v. *The Louisville & Nashville Railroad Company et al.* "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation * * * and then offer their use to everybody impartially." * * * Aside from this, however, a shipper is not bound to provide a car; the duty of providing suitable facilities for its customers rests upon the railroad company. * * *

In *Cincinnati &c. Ry. Co.* v. *Fairbanks & Co.*, 90 Fed. 467, judgment was directed for the plaintiff for the value of cottonseed oil lost by the railroad although there was no evidence of negligence. The oil was contained in tank cars furnished by a private company. The court (Lurton, Taft, and Clark, judges) held that liability as insurer was properly enforced, for the tank cars were furnished as within the obligation to furnish suitable and safe cars. If to furnish the cars had been a special service beyond the scope of the duty of a common carrier, a contrary judgment would have been rendered.

That oil tank cars are reasonably required for the accommodation of modern public necessities sufficiently appears in the cases at bar. Not only is 91 per cent of all the refined oil of the country transported in tank cars, but rail shipment in any other manner is prohibited by the expense (R. 20). Their use effects an economic gain. The oil industry has already adjusted itself to the movement of the product in bulk by refiners, jobbers and dealers. The industry in the United States is vast, in the neighborhood of one hundred companies being engaged in refining the 250,000,000 barrels of oil annually produced (R. 20). Many refineries are located along the line of the Pennsylvania Railroad, and the requirements of the complaining shippers alone are not inconsiderable (R. 21).

**(d) The railroad at bar, however, has held itself out specifically to carry oil in tank cars.**

Whatever may be the common-law obligation to furnish special facilities under the general duty to furnish adequate facilities, however, it is altogether clear that the railroad must provide an adequate number of the kind of cars it specifically advertises and holds itself out to furnish. This limited proposition is sufficient to govern the cases at bar.

The cases are no different than if ordinary box cars were concerned. The fact must be taken as established by the finding of the Commission that the appellee railroad company has specifically held itself out to transport oil in bulk and in tank cars (R. 26).

It may be noted that the railroad in its answer to the complaint before the Commission alleged that in the schedules of rates filed for carrying articles in tank cars it stated that no obligation was assumed to furnish tank cars (R. 16). But the fact of such disclaimer does not appear from the record in the cases at bar. It is not alleged in the petition for injunction nor mentioned in the opinion of the District Court. The railroad evidently regarded it as immaterial, and pitched its case in the court on other considerations. Moreover, the obligation seems to be a matter of law, which follows as a necessary incident from the fact of the holding out and the public nature of the carrying business. The railroad may as well seek to avoid the obligation to furnish box cars by similar protest against the effect of its acts. See *Lloyd* v. *Haugh*, 223 Pa. St. 148, 154.

The Commission's finding of fact that the railroad has held itself out to carry oil in bulk and in tank cars is not reviewable. *United States* v. *L. & N. R. R. Co.*, 235 U. S. 314, 320. Indeed, no other finding would have been justified. The railroad published rates for the transportation of oil in tank cars. It has been the established custom of the railroad at bar and of railroads generally to transport oil in tank cars. The oil industry has developed in reliance thereon. This was found to be economically beneficial and even necessary. For 25 years the Pennsylvania Railroad has itself owned hundreds of tank cars, and has customarily transported oil in a vastly greater number of private oil tank cars (R. 20, 21). The significance of the vast amount of transportation by the railroad in tank cars owned by shippers and private car lines can not be minimized by the fact of such private ownership. The interposition of an independent contractor does not avoid the obligations incident to public service, and the cars must be treated as the carrier's own. See *Railroad Co.* v. *Geraty, supra*; *Interstate Com. Comm.* v. *Illinois Cent. R. R. Co.*, 215 U. S. 452; *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *State* v. *Railway Co., supra; Cincinnati &c. Ry. Co.* v. *Fairbanks & Co., supra; Covington Stock-Yards case, supra; St. Louis &c. R. R. Co.* v. *Renfroe*, 82 Ark. 143; *Railroad Co.* v. *Dies*, 91 Tenn. 177; *Mathis* v. *Southern Ry., supra.*

Having publicly held itself out to transport oil in bulk, and having customarily acted according to its

profession, the obligation follows under the common law to furnish tank cars upon reasonable request.

**2. The duty is clearly imposed by the Hepburn Act of 1906.**

The Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, provides in section 1:

> * * * the term "transportation" shall include cars and all other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof * * *; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor * * *.

Whatever may be the carrier's duties at common law, by the statute responsibility is laid upon the railroad to provide and furnish cars, "irrespective of ownership or of any contract, express or implied, for the use thereof." The duty, moreover, is not simply to "furnish" such transportation, but "to provide"—"obtain so as to have ready or on hand when needed" (Standard Dictionary)—and also furnish. It is not enough simply to furnish such cars as happen to be on hand. All cars of whatever class are included—with the limitation that the request be reasonable.

Judge Thomson, dissenting in the court below, said (R. 57):

> I cannot agree with the proposition that the duty imposed upon the carrier to furnish cars is limited to those which the carrier may

have on hand, or that there is no obligation to acquire facilities it does not possess, or to acquire better facilities to meet the reasonable demands of the shippers. I base my conclusion on words of the act itself, "it shall be the duty of every carrier subject to the provisions of this act, to provide and furnish such transportation on reasonable request therefor." No words more specific or definite than "provide and furnish" could have been chosen. I find no limitation of any kind in the act upon the duty thus imposed upon the carrier, except only that the request therefor be reasonable. There are no words from which it can fairly be assumed that existing ownership or control is a prerequisite to the carrier's duty to provide and furnish. From the explicit words of the act, it would seem to follow that if a reasonable request is made for cars and the carrier does not possess them, it must acquire them for use by one of the many methods for their acquisition. If not, this most important provision of the statute would be rendered largely nugatory.

**(a) Recent decisions in this court recognize the obligation imposed.**

The comprehensive character of the amendment was indicated in *Chicago &c. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426. A Minnesota statute requiring railroad companies to furnish cars for the interstate transportation of freight was held unconstitutional on the ground that the Hepburn Act was the exclusive measure of the carrier's obligation.

What kind of cars were in question does not appear. Mr. Chief Justice White, delivering the opinion of the court, said (p. 434):

> The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared.

The case has been followed many times: *Yazoo &c. R. R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1; *St. Louis &c. Ry. Co.* v. *Edwards*, 227 U. S. 265; *M. K. & T. Ry. Co.* v. *Harris*, 234 U. S. 412, 418; *Menasha Co.* v. *Chicago & Northern Ry.*, 241 U. S. 55, 58.

In *Ellis* v. *Interstate Com. Comm.*, 237 U. S. 434, involving an investigation by the Commission into private car lines operating refrigerator cars, the court said (p. 443):

> The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerator, *tank* and box cars, and that lets these cars to the railroad or to shippers. * * * It is true that the definition of transportation in §1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private car lines, &c., is to be effected by its control over the railroads that are subject to the act. [Italics ours.]

The control of the Commission over the rates charged for the use of refrigerator cars is thus enforced. Since the Commission has control only over services rendered by common carriers, the railroads must have furnished the private refrigerator cars as common carriers. Hence the corresponding duties attach. There can be no distinction between refrigerator cars and oil tank cars, and none is claimed.

**(b) The evil to be remedied by the amendment of 1906 was in part the public injury due to insufficiency of the railroad's supply of tank and refrigerator cars.**

The original Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. 379, provided simply that—

> The term "railroad" as used in this act shall include all bridges and ferries * * *; and the term "transportation" shall include all instrumentalities of shipment or carriage.

In *Scofield* v. *Lake Shore &c. Ry. Co.*, 2 I. C. C. 90 (1888), the Commission held that although there was a common-law obligation to furnish oil tank cars (p. 117), the act of 1887 neither imposed the obligation nor empowered the Commission to enforce it. In *re Transportation of Fruit*, 10 I. C. C. 360 (1904), a similar ruling was made with reference to refrigerator cars (p. 373).

Congress must be deemed to have had a purpose in mind in 1906 in specifically adding cars to the definition of transportation and in imposing the duty to furnish them.

The circumstances surrounding the enactment of the amendment demonstrate that it was specifically intended to cover tank and refrigerator cars. The Hepburn Act of 1906 was the culmination of a long popular agitation in favor of increased control over railroads, especially with reference to abuses of the so-called private car lines. In general, the railroads did not themselves own oil-tank and refrigerator cars, the principal kinds of private cars, but leased them from the private car lines. The message of the President recommending the passage of the amendments, the special message of the President transmitting the report of the Commissioner of the Bureau of Corporations dealing with abuses in connection with refrigerator cars and oil tank cars, the testimony of witnesses before the House and Senate committees, all brought the subject prominently to the attention of the legislative body. The evils were said to be not simply discriminations and rebates by use of allowances to private car owners, but also the power which the railroads had, by failing to provide adequate private-car facilities for some communities while furnishing them to others, to stifle the development of communities in disfavor and to ruin particular shippers to the unjust advantage of competitors. The special report of the Commissioner of Corporations, James R. Garfield, sharply called to the attention of Congress in a special message by the President on May 4, 1906, while debates on the bill in both Houses were in progress, pointed out specific instances of these evils. (Report of the Commissioner of Cor-

porations on the Transportation of Petroleum, 1906. House Doc. 812, 59th Cong., 1st sess.; see Sen. Doc. 428, *id.*; Cong. Rec., vol. 40, pt. 7, p. 6358.) One separate heading in the report was devoted to discriminations in the treatment of private tank cars (pp. 27, 464 *et seq.*). The report states:

> (p. 33) The petroleum industry affords a striking example of the importance of the transportation problem.
>
> (p. 34) * * * The present report, therefore, is concerned particularly with the relative advantages of different refiners in regard to transportation.
>
> (p. 464) Besides the discriminations in rates on oil in California, another form of railroad discrimination practiced on the Pacific coast, and one far-reaching in its effect, occurs in the distribution of transportation facilities. * * * Car shortage or unfair apportionment of tank cars is a complaint on the lips of nearly all independent producers, and it is a complaint that is amply corroborated.

Then follows a recital of instances of oppression, notably the withdrawal of the Union Tank Line cars (controlled by Standard Oil Co.) from the Southern Pacific and the refusal of that company to supply facilities in their stead.

The report continues (p. 466):

> As a result of this condition, independent producers, generally speaking, had only these alternatives: First. To shut down their wells when unable to obtain cars from the railroads.

> Second. To sell their output to one or two large purchasing companies which had cars or had power to obtain them from the railroads.

The testimony of a manager of the United Oil Producers said to be typical of the situation (p. 475–485) was reproduced. He stated that due to inability to obtain cars—

> (p. 475) * * * The Southern Pacific and the Standard Oil Company ran us right out of business. The Standard Oil Company got the business that we lost.
>
> (p. 486) A striking instance of the effect of car shortage upon the business of independent producers is afforded in the case of the King-Keystone Oil Company. * * *
>
> " * * * In consequence of inability to get cars the King-Keystone Company was forced to go out of business and turn over to the Standard Oil Company fifty-three live contracts. These contracts were assigned to the Standard Oil Company on May 20, 1903. They were with the best consumers in San Francisco, and our action was forced upon us."

Similar experiences of the Monte Cristo Oil Company, Union Oil Company, Alma Junior Oil Company, East Puente Oil Company, the Dabney Oil Company (see p. 490) were narrated.

Complaints of inadequate car facilities were not confined to the western coast. The disastrous results to an agricultural community in North Carolina by reason of the failure of the railroads to furnish refrigerator cars were related to Congress by Con-

gressman Thomas, of North Carolina. He said (Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 2, p. 1958):

> * * * there was such a failure on the part of the Armour car line to transport the strawberry crop of eastern North Carolina that the industry, amounting to about $2,000,000 annually, met with apparently at the time almost irretrievable disaster. Immediately following my speech of last session, in which I insisted upon placing the refrigerator cars under the control of the commission, the strawberry growers of North Carolina were confronted not only by high refrigeration and freight rates, but with a car famine. Now, Mr. Chairman, the result was that along the line of the Wilmington and Weldon Railroad, in the strawberry belt, there was a loss of some $750,000 to $1,000,000. The strawberry growers not only depend upon reasonable rates of refrigeration, but depend upon the proper number of cars. Both must be combined. The loss was so great that many crates of strawberries were dumped in White Marsh, and crates were scattered for 2 miles along the side of the railway tracks.

**(c) The history of the amendment of 1906 in the Halls of Congress shows that it was designed to meet this evil.**

Many passages in the debates can be found which tend to prove that the act of 1906 not only covers the duty of the railroad to furnish tank cars, but also the power of the Commission to enforce that duty, a matter to be subsequently considered. The individual opinions of the members of the legislative

body are presented to the court not to show the proper construction of the act as passed, but simply the evil aimed at, and the environment at the time of enactment. The debates may be properly consulted for this purpose. *Tap Line Cases,* 234 U. S. 1, 27; *Seven Cases Eckman's Alterative* v. *United States,* 239 U. S. 510, 515.

Several methods of remedy were proposed in Congress. That adopted by the committee and enacted into law was the enlargement of section 1, so as to impose the duty to furnish tank and refrigerator cars upon the railroad, thereby subjecting it to direct control by the administrative body. Control over private cars would thus follow from control over the railroads. An amendment was offered proposing to abolish private car lines; but the occasional economic advantages of an independent car equipment company precluded the adoption of this suggestion. Another amendment would have made private car lines common carriers subject to the jurisdiction of the Commission. But it was explained in Congress that this would require the shipper and the Commission to deal with two agencies instead of the one railroad, and further, that because the matter was satisfactorily covered by the committee bill the amendment was unnecessary.

A bill to enlarge the powers of the Interstate Commerce Commission, called the Esch-Townsend bill, had been introduced in the 58th Congress and passed only in the House. This bill added nothing to the

definition of the term "transportation." Introducing the Hepburn bill, Mr. Townsend said (Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 2, pp. 1764, 1765):

> * * * The measure which passed the House last session was believed to cover all the facilities of transportation, but inasmuch as some gentlemen contended that it did not, we have endeavored in the present bill to use such language as will take the matter out of the realm of doubt. To that end we have declared that cars, vehicles, and instrumentalities of shipment or carriage * * * shall be considered as being furnished by the carrier, and therefore under the supervision of the Interstate Commerce Commission.
>
> Some of the most serious complaints have been those against these special services. Private car companies have been organized to do the people's work; * * *.
>
> Mr. UNDERWOOD. I would like to know, the gentleman being a member of the committee, whether he can state to us he feels assured that the terms of this bill, if carried out, will control private cars?
>
> Mr. TOWNSEND. I have no doubt about that at all. * * * I have always maintained that the power which gives the Commission control over interstate carriers gives it control over every agency of those carriers and over every car hauled by the carrier, whether owned by it or not; but this bill expressly names private cars.

Mr. Esch, speaking in support of the bill, said (*id.*, pt. 2, p. 2005):

> * * * If there was nothing else in this bill than the provision giving a remedy against these private car lines I would most earnestly support it. * * *
>
> This bill will permit the Commission to grant speedy relief to shippers who allege that they have been unjustly discriminated against in withholding facilities of shipment, such as spur-track connections, car allotments, etc., for we give the Commission in this bill the power to determine and order "what regulation or practice in respect to transportation is just, fair, and reasonable".

Mr. Stevens of Minnesota said (*id.*, pt. 3, p. 2081):

> Now, this measure, in brief, contains five affirmative provisions.
>
> * * * * *
>
> Third. Extending the affirmative power and scope of the Commission over such subjects as private cars and refrigeration, etc.

Mr. Davidson said (*id.*, p. 2103, 2104):

> One of the important features of this proposed legislation is that which defines the word "railroad" and the word "transportation" in a manner to include all these auxiliary companies and all the instrumentalities of a common carrier.
>
> Enact this measure and all the practices and regulations of these auxiliary companies, as well as those of the carriers themselves, will be subject to regulation and control by the Commission.

> * * * The people will not longer submit to a system of control of the public highways of the country which leaves private shippers certain of nothing, but that they are not treated on the same terms as their neighbors, which bankrupts small shippers and enormously increases the wealth of the larger ones, which destroys some communities that it may create others.

Mr. Webber said (*id.*, p. 2109):

> * * * I never could figure out how any private car company has a right as against the public to send its cars over these tracks by contract with the railroad companies.
>
> * * * The gentleman from Maine said, in substance, if he had his way he would do away with the Interstate Commerce Commission. I was startled by the statement he made—that the wronged shipper should resort to common law for redress. I will admit that a wronged shipper has at common law a remedy so far as the law itself is concerned, but the difficulty is in working it out. It may be fine in theory, but impracticable in practice, and it was because of that fact that this Interstate Commerce Commission was organized.

Mr. Dickson, submitting the report of Mr. Pickering, in connection with an investigation of the Illinois Railroad and Warehouse Commission, and referring to the evils of the private car system, said (*id.*, p. 2155):

> * * * If the common carrier authorized by law to transport commodities is short of

> equipment, it should be compelled to purchase sufficient cars to handle the traffic that is offered.

Mr. Wiley, of Alabama, said (*id.*, p. 2241):

> The bill now under consideration does embrace within its provisions, and seeks to regulate them, the private-car and side-track evils, and in that respect, if in none other, it is a far better measure, more remedial and beneficial, than the Esch-Townsend bill, which passed the House twelve months ago, just in time to receive its deathblow in the Senate.

During the debate in the Committee of the Whole in the House Mr. Thomas, of North Carolina, offered an amendment which would add the words after the definition of "transportation" (*id.*, p. 2260):

> and to furnish the number of cars necessary for such transportation without delay.

He said:

> * * * if this amendment is not necessary I do not want it to pass. * * * I want * * * them to furnish the proper number of cars. And if the term "transportation," as used in the bill, covers the proper number of cars, why, all well and good. We had, during the last strawberry season, in my section of the country a car famine, and I want to provide against that. If this bill covers it, why, all right.

The provisions of the bill so clearly covered the situation that the amendment was rejected.

A similar course was followed in the Senate. Senator McCumber, objecting to the definition of "transportation" in section 1, and desiring to put the provisions covering private cars beyond all doubt, offered an amendment to section 1 specifically providing (Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 7, pp. 6374–6375):

> That all refrigerator cars, cold-storage cars, or other freight cars, whether owned by any common carrier or by any other person or corporation, used in interstate commerce, shall be covered by the provisions of this act; * * * .

In discussing this proposed amendment Senator Bailey said (*id.*, p. 6376):

> This bill recognizes, as I believe it ought to do, that a condition has grown up in which certain individuals or corporations have been supplying the facilities which the railroad itself ought to supply. This bill does not interfere with that. This bill still permits, as I read it, any man engaged in any business to load his own cars, ice them in his own way, and tender them to the railroad for carriage; and when the cars are so tendered, the railroad carries them, its only charge being for the naked act of transportation. But, for my part, I rejoice that the Congress in this bill has recognized the duty and has sought to enforce upon the carrier the duty of properly equipping itself for the public service. It seems to have been overlooked that the very

last part of the sentence under consideration provides:

"And it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

That is simply giving the Commission a jurisdiction to enforce the obligation of the carrier as it exists at the common law.

The amendment submitted by Mr. McCumber was rejected.

An amendment by Mr. Kittredge was then proposed, making the private car lines common carriers within the meaning of the act (*id.*, p. 6376); but was rejected. Mr. Clapp, discussing Mr. Kittredge's amendment, pointed out the cogent reasons for rejection, saying (*id.*, p. 6438):

* * * I fully agree with him, as every one else must agree with him, as to the evil known as the private car lines. As he wisely suggested in his remarks last Friday, one of the remedies is the elimination of the private car lines. The committee at its hearings last spring and the members of the committee in considering this subject have been face to face with the proposition whether private car lines could be eliminated. We recognize it is the law that a common carrier must furnish the facilities for transportation; we realize that they depend to-day very largely upon the private car lines for those facilities; and now to abruptly require them to make the necessary investment and to

create that disturbance which would result from the prohibition of the use of these cars by anything but a railroad company seemed entirely too drastic, and the committee had to abandon that thought.

The next plan was how best to meet the evil of the private car lines. One difficulty to-day is that the shipper of fruit and other freight requiring refrigeration has to deal not only with the railroad company which transports that freight, but also he has to deal with the company owning these private cars; and while it did not seem a bit feasible, if advisable, to eliminate the private cars, it did seem as though we ought to take one step forward and *require the common carrier to furnish these cars so far as the shipping public is concerned,* so that the shipper would have to deal only with one corporation, and that would be the carrier, and the carrier would be free either to buy its cars, own its cars, rent its cars, or employ the cars owned by the private car line companies so long as in its last analysis the cost of transportation, including refrigeration and those things especially inherent in the private cars, was within the control of the Interstate Commerce Commission and the shipper had to deal only with one person, and the Commission had to deal only with one person, and that the common carrier. So we provided first as to what a carrier—a railroad—should be, what transportation should be, bringing refrigeration, icing, and all these matters finally under the one head of transportation or freight, so that it would simplify the subject both with the shipper and the Commission. [Italics ours.]

On May 7, in answer to a question from Senator Lodge, Senator Knox, discussing the amendment offered by Mr. Kittredge, said that in his judgment the amendment was unnecessary. He said (*id.*, p. 6440):

> If you will take the bill as the Senator from South Carolina called attention to it a moment ago, you will find that under the definition of transportation that is all provided for. Assuming that they are not carriers and assuming that they are not now within the jurisdiction of the interstate commerce act, what are they? They are facilities and instrumentalities of commerce. That is what they are as a fact, and that, of course, no one can question. They are facilities and instrumentalities of commerce—they are cars. The pending bill says that all instrumentalities and all facilities of every kind used or necessary in the transportation of persons or property shall be within the meaning of this act, and then, in order "to make assurance doubly sure," they bring it in under the title of "transportation," and say that "transportation shall include cars and other vehicles." I therefore think it is wholly unnecessary to adopt the amendment of the Senator from South Dakota.
>
> * * * * *
>
> Mr. LODGE. Mr. President, I have received the answer I desired to receive—that the amendment is unnecessary.
>
> The VICE PRESIDENT. The question is on agreeing to the amendment of the Senator from South Dakota (Mr. Kittredge).
>
> The amendment was rejected.

Senator McCumber, evidently not satisfied with the action of the Senate on the amendments offered previously by him and Senator Kittredge, on May 9 presented a similar amendment, as follows (*id.*, p. 6570):

> That on and after January 1, 1909, every railroad company doing an interstate commerce business shall furnish all freight cars, whether refrigerator, cold-storage, or other specially constructed or designed cars for the carriage of special merchandise, necessary for the conduct of its business as a common carrier. * * *

But for reasons obviously similar to those which had previously governed, this amendment also was rejected.

**(d) The violation of legal duty in these cases is established.**

It seems clear that the District Court was in error in holding that the "practice of the carrier found unlawful in this case was not in violation of the statute" (R. 53).

The reasoning of the court that the term "instrumentalities" in the act of 1887 included cars, hence the addition of the term "cars" in the amendment of 1906 did not enlarge the scope of the carrier's obligations, overlooks the evil sought to be remedied by the amendment, and overlooks the further addition in the amendment of the terms imposing the duty to furnish cars and other instrumentalities.

The court did not hold that if the statutory duty was imposed it was not violated. The findings of

the Commission that "defendant's equipment did not meet the reasonable demands of complainants" (R. 22), and that "the tank cars furnished by defendant plus complainant's privately owned cars have" (R. 23) at times been insufficient, were not challenged before the District Court nor criticised by it. Ample evidence is cited in the report in support. (R. 22, 23.) The finding is not open to attack. *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *United States* v. *L. & N. R. R. Co.*, 235 U. S. 314, 320; *Interstate Com. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470.

*The legal obligation to furnish oil tank cars and its violation in these cases must be taken as established. There remains only the question whether the acknowledged duty is one enforceable by the Commission, or solely by suit in the courts.*

## II.

**The Interstate Commerce Commission has power to order the carrier to comply with a reasonable request to furnish oil tank cars.**

The pertinent provisions of the Act to Regulate Commerce as amended are quoted *supra*, pp. 3–6. The original act of February 4, 1887, c. 104, 24 Stat. 379, did not impose on the carrier the duty to furnish cars or transportation, and contained no provisions empowering the Commission to make effective orders. The duty was imposed and the

power conferred by the amendments of March 2, 1889, c. 382, 25 Stat. 855, 858, June 29, 1906, c. 3591, 34 Stat. 584, 589, and June 18, 1910, c. 309, 36 Stat. 539, 551.

**1. The amendment of 1906 conferred upon the Commission power to make the order in question.**

In support of the Commission's power, the Government relies particularly upon sections 1, 12, and 15, as amended.

Section 12 imposes upon the Commission the authority and duty "to execute and enforce the provisions of this act." Act of March 2, 1889, c. 382, 25 Stat. 858. One of the provisions which it is thus made the duty of the Commission to enforce is section 1, requiring railroads to furnish cars.

At this point reference is made only to the power conferred by section 12, which was in existence in 1906, when section 1 was amended. Section 15, which confers power upon the Commission to prescribe regulations and practices, was further amended in 1910, and the enlarged powers thereby accruing will be subsequently considered.

The very purpose of imposing upon the carrier in 1906 the duty to furnish cars was to give the Commission jurisdiction to enforce that duty. This would seem clearly to be the plan of the legislators from a simple reading of the statute. See also the passages in the debates, *supra*, pp. 37–43.

It is settled that a governing principle in the construction of the Commission's powers under the

amendment of 1906 is its recognized purpose to grant speedy and efficacious remedies for the enforcement of the duties imposed. *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 498, 499. Applying this principle, it seems obvious that remedy for violation of the duty to furnish cars is not to be found in the comparatively slow and cumbersome processes of the courts; but, on the contrary, in the administrative commission established for that purpose.

**2. The amendment of 1910 serves to remove all doubt.**

**(a) Section 15 expressly empowers the Commission to issue orders prescribing any regulations or practices whatsoever in respect to transportation.**

It is not necessary to rest the argument in support of the Commission's jurisdiction solely upon section 12. The order in question deals with a regulation or practice of the railroad in furnishing the facilities of transportation, and section 15 in explicit terms authorizes the Commission by order to prescribe regulations or practices of that character.

Section 15 as amended in the act of 1906 was as follows (34 Stat. 589):

> That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the

> transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers *affecting such rates*, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. * * * [Italics ours.]

In 1910 the italicized words "affecting such rates" were stricken out. The provision in full as amended on June 18, 1910, 36 Stat. 551, is quoted *supra*, pp. 5, 6.

After it had been held that the Commission as created by the act of 1887 had no power to fix rates, it became recognized that its hands would have to be strengthened in this regard. The devices of rebating, as one method of discrimination in rates, were more effectually prevented by the Elkins Act

of 1903. The power to prescribe future reasonable and nondiscriminatory rates was added by the amendment of 1906. Problems of rates and discriminations, and the principles governing their solution, thus were soon largely settled. But thereafter it became clear that provisions for reasonable and nondiscriminatory rates were not enough. It is often more highly important to the shipper to secure adequate service than to have reasonable rates. His business can not be carried on at all in some instances if transportation facilities are not adequately furnished, whereas unreasonably high rates are often merely a matter of increased expense. Where, as with the California oil producers and the North Carolina strawberry growers (*supra*, pp. 33–35), whole industries are handicapped by lack of car facilities, not only is the shipper injuriously affected but the consuming public is compelled to pay higher prices.[1]

The consciousness of the necessity of increased control over service and facilities became a settled conviction in the legislative mind in 1910. The Commission undoubtedly had power to deal with some

[1] The importance of the subject in the public mind is indicated by the fact that in practically all States there are penalty statutes compelling the prompt furnishing of cars. See *Chicago &c. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275; *St. Louis &c. Ry. Co.* v. *Arkansas*, 217 U. S. 136; *Southern Ry. Co.* v. *Moore*, 133 Ga. 806, 26 L. R. A. (N. S.) 851; *Patterson* v. *Missouri Pacific Ry. Co.*, 77 Kans. 236, 15 L. R. A. (N. S.) 733; *Houston & Texas Central R. R. Co.* v. *Mayes*, 201 U. S. 321.

regulations and practices of the carrier, even though not affecting rates directly, under the act of 1906. See *Interstate Com. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 475, 476, 477 (1910). But the extent of the power already conferred was not thoroughly appreciated, and it was deemed so important to secure effective provisions for adequate service that in the amendment of 1910 it was proposed to make the legislative declaration of the duties to render reasonable service all-embracing, and to put beyond reasonable question the power of the Commission to compel such service.

The report of the Committee on Interstate and Foreign Commerce which on April 1, 1910, recommended the bill to amend the Interstate Commerce Act (H. R. 17536, House Report No. 923, 61st Cong., 2d sess.), stated (p. 10):

> Section 9 proposes to amend section 15 of the act to regulate commerce. Section 15 of the act to regulate commerce is the section under which orders of the Commission in regard to rates are now made. Under the provisions of section 15, as it now stands, the authority of the Commission to enter an order is confined to the subject-matter of rates for transportation and regulations or practices "affecting such rates" and the establishment of through routes where "no reasonable or satisfactory through route exists". As recommended to be amended by your committee, section 15 of the present law will have its scope largely increased, and the jurisdiction of the Commission will be much enlarged.

> Under the section as reported, the Commission is given jurisdiction to enter orders not only in regard to rates, but also in regard to classifications, regulations, or practices, whether they affect rates or not, and to determine what are proper classifications, regulations, and practices, in addition to rates, and to require the carriers not only to follow the rate which may be fixed by the order of the Commission, but also to adopt the classification and conform to and establish, observe, and enforce the regulation or practice prescribed by the Commission, and this provision should be read in connection with the amendment recommended by your committee to sections 1 and 13 of the existing interstate commerce act.

The amendment to section 1 referred to was enacted in the statute substantially as recommended. H. Rept. No. 923, *supra*, p. 25, act of June 18, 1910, 36 Stat. 546, sec. 1.

Mr. Mann, in introducing the bill in the House, said (Cong. Rec., 61st Cong., 2d sess., vol. 45, pt. 5, p. 4571):

> * * * It is their [the railroad's] due that they be treated with fairness and reasonable consideration by Government and by the people, and it is our duty to see that they shall treat fairly all those who deal with them, and that they shall furnish with reasonable diligence those advantages of convenient and economical transportation for which they are constructed and operated under favors granted by the States.

(p. 4572) Broadly speaking, the propositions involved in the pending bill may mostly be covered under three general heads:

First. To expedite justice through speedy determination of disputes by means of the creation of the commerce court and other methods provided in the bill.

Second. Enlarging the statutory duties of the railways and the rights of shippers and increasing the powers of the Interstate Commerce Commission; so that classifications, regulations, and practices shall be just and reasonable and enforceable as such, whether affecting the rates charged or not.

Third. Regulating the consolidation of railroads and the stocks and bonds which may be issued, etc.

(p. 4573) We have conferred upon the Interstate Commerce Commission the broadest kind of powers now so far as railway rates are concerned, and we are proposing in this bill to greatly enlarge their power by giving them the same power over classifications, regulations, and practices which they now have over rates.

An amendment was offered designed to give the Commission the power to prescribe and establish rules and requirements to control the acts, charges and practices and enforce the duties and obligations of all common carriers, but it was rejected after Mr. Mann, in charge of the bill, had explained that the matter was fully covered. Mr. Mann said (pt. 6, *id.*, p. 5852):

Mr. Chairman, so far as I could learn from the reading of the amendment, everything in it

> is now covered in the bill. * * * Section 6a of the bill, amending section 1, makes it the duty of common carriers to establish just classifications, regulations and practices in reference to a number of things that are enumerated in the bill, and practically covering everything in connection with the receipt, handling, transporting, storage, and delivery of property subject to the provisions of the act which may be necessary or convenient to secure the safe and prompt receipt, handling, transportation, and delivery of property upon just and reasonable terms; and every unjust and unreasonable classification and practice is prohibited and declared to be unlawful. That is all in section 1. It imposes that duty on railway carriers and section 13 of the act provides that if this is not done complaint can be filed before the commission, or the commission, on its own initiative, may make the investigation. Section 15 of the act to regulate commerce, which is section 9 of this bill now under consideration, gives to the commission, if the railway company does not establish these just and reasonable regulations, practices, classifications, and rates, the power to establish them, and require the railway company to enforce and observe them.

The conference report recommended the passage of the provisions mentioned. Conference Report No. 1588 on House bill 17536, Sen. Doc. No. 623; see Cong. Rec., vol. 45, pt. 8, p. 8134 *et seq.* The statement of the managers on the part of the House in the

conference committee included this language (p. 8141):

> and retains the important provision requiring common carriers to establish, observe, and enforce just and reasonable classifications of property for transportation, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, etc. * * *

That the power conferred upon the Commission was intended to be most comprehensive is shown by the terms of section 15. The words are "*any* individual or joint classifications, regulations, or practices *whatsoever.*" A regulation is a written rule governing a method of doing business. A practice clearly is not limited to such methods as have become habits. It includes any manner of performing the duties imposed by the act.

Consideration of the amendment to section 1 in the act of 1910 also shows the all-embracing character of the practices over which the control of the Commission was extended. Section 1, as appears from the committee report recommending the legislation of 1910, is to be read in connection with section 15. The paragraph added to section 1 (paragraph 4 of the act now in force) is as follows (36 Stat. 546, c. 309, June 18, 1910):

> And it is hereby made the duty of all common carriers subject to the provisions of this

> Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

Many matters included within the meaning of facilities of transportation are enumerated. The duty to observe just and reasonable regulations and practices affecting—

> classifications,
>
> the issuance, form, and substance of tickets, receipts, and bills of lading,

the manner and method of presenting, marking, packing, and delivering property for transportation,

the carrying of personal, sample, and excess baggage,

are all specifically mentioned. But these are given only as examples of the wide character of the regulations and practices intended to be covered. For the paragraph goes on to prescribe the duty of the carrier to make reasonable regulations and practices affecting "the facilities for transportation," and "all other matters relating to or connected with the receiving, handling, transporting, storing, and delivering of property." The regulations and practices are to be such as may be necessary or even proper to secure the safe and the prompt receipt, handling, transporting and delivery. In making the paragraph all-comprehensive, it was necessary to include many of the matters already covered in the amendment of 1906 in paragraph 2 of section 1. For instance, in both, the duty to carry upon just and reasonable terms is specifically mentioned. In both, facilities of transportation are particularly named. Under paragraph 2, the carrier has the duty to furnish facilities of shipment. Paragraph 4 provides that the carrier must establish and observe just and reasonable regulations and practices affecting facilities for transportation. Similarly, in paragraph 2, the duty is imposed to provide and furnish upon reasonable request all service in connection with the receipt, delivery and transfer in transit of property transported. In section 4 the duty is imposed

to establish just and reasonable regulations and practices affecting the receiving, handling, transporting, and delivery of property. Some repetition was deemed necessary, because the words of the second paragraph had been the subject of judicial construction, and it was not desired to disturb their settled meaning.

The consistent plan is clear. Paragraph 2 imposes the duty to furnish adequate service. Paragraph 4 provides that as to the particular manner of performing the duty, the carrier must establish and observe just and reasonable regulations and practices. And if those established by the carrier are not reasonable, section 15 gives the Commission power to prescribe reasonable regulations and practices, which are to be in the future observed.

**(b) The order in these cases deals with a regulation or practice under section 15 as amended.**

The railroad company, in denying the request of the Pennsylvania Paraffine Works to send tank cars sufficient to ship 450,000 gallons of oil per month, laid down its rule in a letter as follows:

> We beg to say that the railroad company is not prepared to increase its present tank car equipment. (R. 21.)

This was a rule to be followed in the future. The subject matter was the manner of complying with the duty to furnish a facility of transportation. It was in writing, and might well be termed a regulation within the meaning of the statute.

The Commission found that it was a practice and that it was unlawful. The order required the railroad in the future to observe a method of dealing with the receipt, transporting, and delivery of oil in bulk by means of tank cars, *i. e.*, a practice affecting such receipt and transporting.

Whether a particular manner of doing business constitutes a practice is a question of fact which, in case of dispute, is for the Commission to determine. If there is any evidence upon which the determination of the Commission may rest, the Commission's decision is final. *Interstate Com. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470; *Balto. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 494; *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320. It can not be said that the finding of the Commission in these cases that a practice was involved (R. 28) is utterly unsupported by the evidence.

All of the members of the District Court agreed that the order dealt with a practice. The majority held simply that the practice was not unlawful. Judge Woolley, speaking for himself and District Judge Orr, said (R. 53):

> * * * the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law.

In *Atchison Railway Co.* v. *United States*, 232 U. S. 199, the railroad company refused to extend the privi-

lege of precooling shipments of citrus fruits in refrigerator cars and cancelled its tariffs. The Commission held the refusal unlawful and entered an order requiring the roads to permit precooled shipments at the rate fixed (p. 204). This court upheld the order of the Commission as an order affecting a practice (p. 218). In the *Atchison* case the railroad company refused to furnish adequate car service for transporting fruit. In the cases at bar the railroad company has refused to render adequate car service for transporting oil. Both involve practices.

In *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, damages were sought for failure to supply adequate cars for shipment in bulk of wheat, oats, rye, apples, cabbages and potatoes. Ordinary box and refrigerator cars are inadequate for this service until equipped with inside doors and bulkheads. These practices affecting the furnishing of cars were held to be within the control of the Commission. This court said (p. 50):

> * * * Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted.

Similarly, whether linings in cars for potato shipments in winter, or special heated cars shall be furnished (see *N. Y. Shippers' Association* v. *N. Y. Central &c. R. R. Co.*, 30 I. C. C. 437), whether shipments

of potatoes may be refused in winter altogether (see *Protection of Potato Shipments in Winter*, 26 I. C. C. 681, 685), whether flat cars for carriage of lumber should be equipped with stakes (see *Nat. Lumber Dealers' Ass'n* v. *Atlantic Coast Line R. R. Co.*, 14 I. C. C. 154), or cars padded in which flour in sacks is carried (see *Millers' Club* v. *R. R. Co.*, 26 I. C. C. 245), or grain cars equipped with outside grain doors for shipment in bulk (see *Farmers Co-op. Ass'n* v. *R. R. Co.*, 34 I. C. C. 60), are questions involving practices or regulations affecting transportation within the control of the Commission. Similarly the conduct of a railroad with respect to station restaurants (see *Montgomery* v. *C. B. & Q. R. R. Co.*, 228 Fed. 616), and storage in transit privileges (see *Newmark Grain Co.* v. *Southern Pacific Co.*, 30 I. C. C. 431), is within the control of the Commission.

(c) The order was within the jurisdiction of the Commission even if not strictly a practice.

The powers of the Commission to issue orders under sections of the act other than section 15 have already been considered in connection with the amendment of 1906, *supra*, pp. 47, 48. Section 12 is relied upon and is still in force. Moreover, the concluding paragraph of section 15 that the enumeration of powers in section 15 "shall not exclude any power which the commission would otherwise have in the making of an order under the provisions of this Act," was continued in the act of 1910, c. 309, 36 Stat. 551. It demonstrates that the enumeration of the powers

in section 15 was in extension rather than in limitation of those otherwise conferred.

In all of the cases in this court involving the amendments of 1906 and 1910 there has been no disposition to whittle away the broad powers granted. Thus, although the order in the *Pipe Line Cases*, 234 U. S. 548, requiring pipe lines to file tariff schedules, did not strictly speaking involve a practice, it was sustained.

Considerations based upon the policy of the entire act require that the Commission's order in the instant cases be sustained. This is necessary, it is submitted, in order to effectuate the broad underlying purposes of the amendments to submit administrative questions to an expert tribunal; to secure uniformity in administration; to prevent discrimination with respect to rates and car facilities howsoever attempted; and to provide for effective enforcement by administrative rather than judicial orders.

**3. The question whether the duty to provide and furnish cars is violated is administrative, and uniform control by the Commission is requisite.**

It is settled that a prime object of the amended act was to confide to the Commission for determination all administrative questions. As was said in the *Minnesota Rate Cases*, 230 U. S. 352, 419, 420:

> * * * The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose;

> and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it.

The administrative character of the question as to the adequacy of the supply of cars appears from the host of complicated facts upon which its solution must often depend. The duty is not absolute but relative. As was said by this court in dealing with a State regulation requiring an interstate train to make local stops in *Atlantic Coast Line R. R. Co.*, v. *Wharton*, 207 U. S. 328, 335:

> The term "adequate or reasonable facilities" is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost.

An illustration of the administrative character of the questions involved is given in the cases at bar. In alleging a violation of duty the shippers complained of the railroad's methods of settlement of damage to their private cars, of delays in delivery and return of empties, and of failure to report the

location of cars (R. 22). The railroad claimed that though there had been delay, an adequate car service had been furnished to meet the shippers' demands (R. 22, 23). The figures of car demands at various dates and cars furnished seem complicated. In its opinion the Commission dealt with the varied character of the 44 liquid commodities transported in tank cars, and recognized that for some, by reason of the technical knowledge required in preparation for shipment, the small amount of the demand or the dangerous nature of the handling, it would not be reasonable to require the railroads to furnish tank cars (R. 32). As to these shipments, which were held to be in a different class from shipments of petroleum, a rule was laid down that the common carriers

> should publish rates for the transportation of the privately owned tank car filled with these products and not, as in the case of oil, for the transportation of the product in tank cars (R. 32).

There was imported into the proceeding before the Commission the bearing of the shippers' past supply of private tank cars (R. 23), of the obligations of other railroads to supply like equipment (R. 32), and the extent of capital outlay required (R. 31, 33). All the manifold considerations which determine the reasonableness of the demand for cars show that the expert Commission properly has jurisdiction.

The purely administrative character of the question in many cases is apparent. While in such cases the

courts would have no jurisdiction in the first instance, the violation of the carrier's duty may be so plain in a particular case that suit for damages may be brought in the courts without prior administrative determination. A carrier's capricious or wholly unjustified refusal to furnish cars to a particular shipper can be compensated directly by the courts. See *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70. An illustration is furnished in *Eastern Ry. Co.* v. *Littlefield*, 237 U. S. 140, where the carrier was requested in May to furnish cars for October shipments. It not only offered no valid excuse but did not even notify the shipper of its inability to furnish cars at the time the shipments were tendered in October.

It is well settled that the procedure in the analogous cases of discrimination is governed by similar principles. *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121. In *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275, damages for failure to furnish coal cars were recovered. The carrier's rule for the distribution of cars was not attacked. The court instructed the jury that if the common carrier had fairly distributed its available cars it would not be liable. The jury found for the plaintiff. Hence the carrier had violated its own rule of distribution (pp. 278, 283) and it was held there was no administrative question demanding prior determination by the Commission.

If, on the other hand, as in the *Morrisdale Coal Company* case, *supra*, the violation of the carrier's duty is not plain from any aspect, but administrative questions of fact are involved, the Commission has exclusive jurisdiction in the first instance.

From these decisions it is apparent that many cases involving questions of adequacy of car facilities must first proceed exclusively before the Commission. Clearly the question may properly be first submitted to the Commission in all cases. The complaining shipper in a case involving a plain breach of duty would have his election to go to the Commission. Thus, in *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 471, 472, where damages for inadequate and discriminatory car service were sought in the courts independently of proceedings before the Commission, the claim being that the carrier had violated its own rule of distribution, it was held that it had not only been proper for the shipper to proceed before the Commission, but that, having done so prior to the institution of suit, he was bound by his election.

From further considerations does the necessity for one centralized administrative control appear. Control over car equipment seems to follow as a necessary incident from the established power over through routes. The Commission has authority to require interchange of cars in connection with through routes. *Missouri & Illinois Coal Co.* v. *Illinois Central R. R. Co.*, 22 I. C. C. 39; *Pittsburg & S. W. Coal Co.* v. *Ry. Co.*, 31 I. C. C. 660, 663; sec. 1, par. 2,

and sec. 15 of the act as amended June 18, 1910, c. 309, 36 Stat. 539, 545, 551; sec. 7, act of February 4, 1887, c. 104, 24 Stat. 382. If in an established through route one carrier has an insufficient number of cars, in all fairness to the connecting carrier the Commission should have power to compel the delinquent to provide its proper quota.

In *United States ex rel. Stony Fork Coal Co.* v. *Louisville & Nashville R. R. Co.*, 195 Fed. 88, mandamus was awarded to compel the transportation of coal on an established through route, but questions as to the number of cars to be furnished by each connecting carrier were held to be within the jurisdiction of the Commission (p. 94). In the *Missouri & Illinois Coal Co.* case, *supra*, the railroad's excuse for failure to furnish cars for transportation beyond its own lines, that other railroads unlawfully withheld the return of cars, was held insufficient. In *St. Louis &c. Ry. Co.* v. *Arkansas*, 217 U. S. 136, suit was brought for failure to furnish cars as required under local statutory authority. The state court allowed recovery, holding that the cause of the railroad's failure was inability to regain cars on other lines, which in turn was due to the insufficiency of the rules of the American Railway Association regulating the interchange of cars. This court reversed the judgment, and said that if it be conceded that the rules of the American Railway Association were inefficient (p. 150):

> * * * In the nature of things, as the rules and regulations of the association con-

> cern matters of interstate commerce inherently within Federal control, the power to determine their sufficiency we think was primarily vested in the body upon whom Congress has conferred authority in that regard.

These cases demonstrate the intimate connection between questions of through routes and car equipment.

From still another viewpoint, namely the inseparable connection between matters of car equipment and of rates, is the necessity for common Commission control shown. In *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, shippers brought suit in a state court for the expense of furnishing lumber to fix box cars for the transportation of wheat, oats, apples and potatoes, etc., "upon the theory that the carrier having failed to perform its common-law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay." It was held in the Court of Appeals of New York "that the common law imposed upon the railroads the duty of furnishing cars equipped with inside doors, or bulkheads for transporting grain or provisions in bulk" (p. 48). But the jurisdiction of the courts to afford relief was denied on the ground that the question was administrative, saying (p. 50):

> * * * And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court.

If in the instant cases the complaining shippers had been compelled to ship oil in barrels instead of tank cars, and had sued to recover excess transportation charges occasioned thereby (see *Mathis* v. *Southern Ry. Co., supra*), a ruling similar to that in the *Loomis* case would have followed. The complainants would have been referred to the Commission, which has "ample authority * * * to administer proper relief, and in connection therewith to approve some general rule of action" (240 U. S. 50).

In *Texas & Pacific Ry. Co.* v. *American Tie Co.*, 234 U. S. 138, suit was brought in a State court for failure to furnish cars for the transportation of oak crossties. It appeared that the railroad company had filed no tariff particularly relating to oak crossties, and had reasonable excuse therefor because there had been no prior demand for such transportation. The shipper claimed that the tariff on lumber generally was applicable. This court held that no recovery for the refusal to furnish the cars could be had in absence of an administrative ruling by the Commission.

In view of these cases, the Commission, which admittedly has power over rates, would seem necessarily also to have control over car facilities.

**4. Control by the Commission is imperatively required if the purpose of the act to prevent discrimination is to be effectuated.**

Although the necessity for uniform common control over the car equipment of interstate railroads appears plainly enough from the administrative character of the problems involved, the simplest and most cogent

consideration, leading to the same result, is based upon the inseparable connection of the problem of adequate car facilities with that of discrimination.

The great purpose of the Act to Regulate Commerce to prevent discrimination has been recognized in many cases before this court. *Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426; *Interstate Com. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452. The prohibition against discrimination extends not only to rates but also to car facilities. *Balto. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304.

If the duty to furnish cars is to be enforced by suits for damages or by mandamus proceedings in the courts rather than by administrative rulings by the Commission, discrimination must inevitably result from the variety and contrariety of the judgments and opinions of the various courts and juries to which the question is submitted. Examples of such contrariety of judgment are given in the opinion in the *Pitcairn* case, 215 U. S. 495 *et seq.* If the case does not involve a clear and unequivocal breach of duty by the carrier viewed from any standpoint, but an excuse is presented dealing with any of the various questions proper to be considered in the exercise of administrative discretion, such as the foreseeability of an increased demand for cars, the reasonableness of compliance therewith, the rules for return of cars in use on other railroads, etc., a

suit in one court might result in an order of mandamus requiring a railroad in one district to furnish a particular shipper with cars, and a suit presenting precisely similar facts in another district might result in the denial of relief to a complaining competitor.

*We are now dealing with the cases at bar on the basis that the legal obligation to furnish tank cars is acknowledged, and that the only question is simply whether the courts or the Commission is to enforce that duty. When once the true nature of the inquiry is thus clearly appreciated, the conclusion is inevitable—if the purpose of the act as a whole is not to be largely frustrated—that the administrative power in question lies with the latter tribunal. The doctrine of the Abilene and Pitcairn cases irresistibly requires that the jurisdiction of the Commission be sustained.*

On the whole it seems that the majority of the court below, and the dissenting commissioners, failed to grasp the effect of the Hepburn and Mann amendments. They held the power was not granted to the Commission because not done by express particular words. The Government insists that the language of sections 1, 12, and 15 clearly confers the power. But, even if the terms were not clear, the great basic purposes of the act would require such jurisdiction by necessary implication.

**5. The order involves the exercise of no new or unusual power by the Commission.**

Railroads are universally recognized to be public agencies. See *Mich. Cent. R. R. Co.* v. *Mich. R. R. Comm.*, 236 U. S. 615, 632. Prior to 1906 the power which the railroads had over their equipment and facilities for interstate transportation was unrestrained by statute. Railroad officials were able to retard the development of whole communities by refusing altogether to provide adequate transportation facilities; and by furnishing facilities to favored shippers, at the same time refusing them to competitors, they could crush out the unfortunate interests. Examples of the exercise of this power have been seen. *Supra*, p. 34. The prohibitive difference between the cost of transportation of oil by barrels and by tank cars at the present time shows that, unless restrained, the power still may be ruinously exercised.

The act does not now propose to transfer to the Commission the power which railroad officials as public agents have had. The claim that if the jurisdiction of the Commission is upheld the boards of directors of the railroads will be thereby supplanted is fantastic. It is still for the railroads to initiate their regulations and practices. The Commission exists not as a substitute for boards of directors but merely to prevent a breach of their public duty. It may interfere, not to impose new duties but to remedy violation of those established. The

statutory provision is simply precaution against abuse of the powers of one public body by control by another.

The limited character of the Commission's powers appears from another angle. The act does not require a railroad to be built, but only that when a railroad has been built adequate transportation thereon shall be furnished. For the act in section 1 defines "railroad" as including "all bridges and ferries used or operated in connection with any railroad, and also all the road in use * * * all switches, spurs, tracks, and terminal facilities of every kind * * * and also all freight depots, yards, and grounds * * *." Act of June 18, 1910, c. 309, 36 Stat. 545. It imposes upon the carrier no duty to furnish a railroad. The words are that the carrier must provide and furnish only "transportation" upon reasonable request.

In providing a remedy for violation of the railroad's duty statutory safeguards of the rights of the railroad are furnished. There must be a hearing, investigation, adequate evidence. Thereafter order may issue only if the request for transportation is reasonable.

Finally, assurance against arbitrary action by the Commission is guaranteed by the control of the courts.

Judicial remedy for violation of the railroad's duty to furnish adequate service has been found in

the past directly in the processes of the courts.[1] This has not been thought to substitute the judgment of the court for that of the railroad officials. The administrative remedy by the Commission does so to no greater extent.

Many State statutes have been passed regulating in details the railroad's facilities of transportation.[2]

[1] Mandamus was awarded to compel, in *People* v. *St. Louis &c. R. R. Co.*, 176 Ill. 512, the operation of a separate passenger train; in *State ex rel. Ellis* v. *Atlantic Coast Line R. R. Co.*, 53 Fla. 650, the repair of road bed and track; the furnishing of coal cars in *Loraine* v. *R. R. Co.*, 205 Pa. St. 132; the resumption of a branch street railway service in *State* v. *Spokane St. Ry. Co.*, 19 Wash. 518; the establishment and maintenance of a station in *People* v. *C. & A. R. R. Co.*, 130 Ill. 175, and in *State* v. *Rep. V. R. R. Co.*, 17 Neb. 647. In all of these cases there was no statutory or charter duty, but the writ was awarded solely to enforce the common law duty. The difficulties of remedy by mandamus are manifest. Where the duty has been imposed by statute or charter, mandamus has been frequently awarded. See, for example, *U. P. R. R. Co.* v. *Hall*, 91 U. S. 343; *State* v. *R. R. Co.*, 29 Conn. 539. In *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, a court of equity ordered adequate stock yards delivery service.

[2] Cases in this court only are cited as illustrative: *Minn. &c. R. R. Co.* v. *Minn.*, 193 U. S. 53 (stations); *Mich. Cent. R. R. Co.* v. *Mich. R. R. Comm.*, 236 U. S. 615; *Grand Trunk Ry.* v. *Mich. Ry. Comm.*, 231 U. S. 457 (interchange of traffic); *Wis. &c. R. R.* v. *Jacobson*, 179 U. S. 287 (track connections for interchange of traffic); *Atlantic Coast Line R. R. Co.* v. *N. Car. Corp. Comm.*, 206 U. S. 1 (change in time schedule to afford connection); *C. M. & St. P. Ry.* v. *Iowa*, 233 U. S. 334 (acceptance of loaded cars from another line); *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262 (operation of passenger train); *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275; *Penna. R. R. Co.* v. *Clark Coal Co.* 238 U. S. 456; *Hampton* v. *St. Louis &c. Ry.*, 227 U. S. 456 (furnishing of cars); *Lake Shore &c. Ry.* v. *Ohio*, 173 U. S. 285 (stopping of trains).

These statutes have gone beyond specification of the common law duty, and remedies for breach thereof. Such interference with the discretion of railroad officials has not been held undue. Obviously questions of adequacy of service to accommodate the public depend upon the particular facts in individual cases and are most fit for determination by an expert administrative tribunal.

## III.

**The order is not subject to the objection that it compels the use of cars beyond the line of the railroad.**

This objection, as well as the other subordinate objections subsequently discussed, were not considered in the opinion of the court below. It is, of course, settled that "if the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission." *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361. In other words only "power to make the order and not the mere expediency or wisdom of having made it, is the question." *Interstate Com. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470.

Although the complaining refiners' works seem to be on the line of the New York Central Railroad (R. 20, 21) as well as on the line of the Pennsylvania R. R. Co., the order of course does not require the

Pennsylvania Company to furnish cars for initial movement on the New York Central line.

It is not shown that any cars were or will be requested for shipment beyond the lines of the Pennsylvania Railroad Company. The implication is otherwise. In paragraph 5 of the complaint of the Pennsylvania Paraffine Works filed with the Interstate Commerce Commission the complainant alleges (R. 8)—

> * * * that the lines, trackage, and railway of said Pennsylvania Railroad Company run and reach the several points and places where your complainant is requested to and does deliver its oils, gasoline, and the products of its refinery to its customers and purchasers of the products of said refinery. That with proper and efficient methods and fair service on the part of the said railroad company, substantially all the products of such refinery would and should be transported over the lines of said Pennsylvania Railroad Company.

In the *Crew-Levick* case (R. 7, No. 340), the complainant before the Interstate Commerce Commission alleged:

> * * * that the lines, trackage, and railway of said Pennsylvania Railroad Company run and reach the several points and places where your complainant is requested to and does deliver its oils, gasoline, and the products of its refinery at or near Warren, Pa.

The report of the Commission stated (R. 21):

> * * * Complainants assert that defendant's line is the most direct route to nearly

> all of the destinations to which they are accustomed to ship, and that with fair service on defendant's part substantially all of the products of complainants' refineries would be transported over its line.

If under the order made in this case the railroad company should be requested to send one of its cars beyond the limits of its line it would then be time for the railroad to raise objection. In this proceeding it is premature.

That the Commission has power, however, incident to its control over through routes and interchange of cars, to compel the shipment of cars beyond the limits of the line of any railroad company would seem to follow from the cases of *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1; *Michigan Central R. R. Co.* v. *Michigan R. R. Comm.,* 236 U. S. 615; *Missouri & Illinois Coal Co.* v. *Ill. C. R. R. Co.,* 22 I. C. C. 39. The Commission, as we have seen, has ample power to provide for compensation for the use of a railroad's equipment on the line of a connecting road, and to provide for the prompt return of such equipment or adjustment for loss or damage thereto, and to require a connecting carrier to furnish its proper quota of cars (R. 33). *Supra,* pp. 66, 67. As was said in the *Michigan Central R. R. Co.* case, 236 U. S. 615, where a writ of mandamus compelling interchange of cars between connecting carriers in interstate traffic was sustained:

> (p. 631) That it is not as a rule unreasonable to require such interchange of cars sufficiently

> appears from the universality of the practice, which became prevalent before it was made compulsory, and may be considered as matter of common knowledge, inasmuch as a freight train made up wholly of the cars of a single railroad is, in these days, a rarity. * * *
>
> (p. 632) To speak of the order as requiring the cars of plaintiff in error to be delivered to the Detroit United "for the use of that company" involves a fallacy. The order is designed for the benefit of the public having occasion to employ the connecting lines in through transportation. The Detroit United, like the Michigan Central, acts in the matter as a public agency.
>
> * * * Certainly the order does not exclude the ordinary remedies for delay in returning cars or for loss or damage to them. Nor does it contemplate that plaintiff in error shall be required to permit the use of its cars (or of the cars of other carriers for which it is responsible) off its line without compensation.

As showing that matters of compensation for the use of cars by a connecting carrier are not open in this proceeding, the case of *Pennsylvania Co.* v. *United States*, 236 U. S. 351, is pertinent. In that case an order of the Commission required the cessation of discrimination in accepting through cars, but did not provide the rates and division of joint receipts or compensation for service rendered. It was held that the petition for preliminary injunction against en-

forcement of the order should be dismissed. The court said (pp. 361, 362):

> It is to be remembered that in the aspect which the case now presents, there is no question as to the terms which the Commission might prescribe, or the compensation which the Pennsylvania Company should receive for the service to be rendered. The sole question is whether the Commission exceeded its authority in requiring the Pennsylvania Company to cease and desist from what the Commission found to be a discriminatory practice.

## IV.

**The order is not void because indefinite or uncertain.**

The order is definite and certain. It disposed of the only controversies before the Commission. These related to the general duties of the carrier in the premises and the jurisdiction of the Commission to order the duties performed.

The order follows the language of the statute. None would contend that the statute is void for uncertainty. It is as simple to obey the one as the other.

The order seems as definite as that upheld in *Pennsylvania Co.* v. *United States*, 236 U. S. 351. See also *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 221 U. S. 612, 621, 622.

Moreover, the order is as specific as it could reasonably be. It is found that the railroad has not furnished sufficient tank cars to supply the reasonable demands of the complainant shippers. The

shippers' requirements and the demands made are known. The order requires the railroad to furnish upon reasonable request and upon reasonable notice at complainants' respective refineries tank cars in sufficient number to transport complainants' normal shipments. The opinion of the Commission with reference to normal shipments states (R. 33, 34):

> One of the tests which may be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business. Complainants have not only shown that the volume of their past shipments is such as to justify the demands for equipment which they have made but also have introduced evidence tending to show that in the future the volume of their business will be as great as in the past. Defendant will be required, upon reasonable request and reasonable notice, to furnish tank cars in sufficient number to move complainants' normal production. Defendant can not be required to furnish all the cars which may be demanded by complainants under extraordinary conditions arising from exceptional causes, which could not reasonably have been anticipated and which make it physically impossible to furnish all the cars desired.

Thus normal shipments are defined to be those which are reasonably to be anticipated in the light of past demands. There can be little doubt that the railroad will have no difficulty in complying with the order.

The objection again is premature. Until the railroad has made some effort to comply, it is in no position to urge on petition for a preliminary injunction that the order is indefinite.

## V.

### The order does not require an unlawful interference with the rights of owners of private cars.

The order itself contains no word with reference to the distribution of cars owned or leased by private shippers. The statement in the opinion of the Commission that privately owned cars are available, means, of course, with the consent of the owners. The rule, moreover, that in the future the carrier must count as part of its equipment all of the privately owned cars on its lines is in accordance with sound law. It was held in *Interstate Com. Comm.* v. *Illinois Central R. R. Co., supra,* and *Balto. & Ohio R. R. Co.* v. *Pitcairn Coal Co., supra,* that private fuel cars, company fuel cars and foreign owned fuel cars must be counted in the distribution of coal cars as part of the carrier's equipment. The Act to Regulate Commerce states that the duty to provide and furnish cars exists "irrespective of ownership or of any contract, express or implied, for the use thereof." A railroad could not purchase cars with a contractual limitation that they be used for the benefit of particular shippers only. This would be too easy a method of discrimination. A similar result can not be accomplished by the device of leasing. The rule

announced by the Commission for guidance of railroads in the future is correct: "Carriers should lease cars only upon such terms as permit them to meet their obligation to furnish cars without discrimination" (R. 33).

The rights of private car owners, it may be noted, cannot be asserted in this case by the railroad.

The question, furthermore, may never arise. The railroad company may furnish a fully adequate supply of cars to meet the complainants' needs by building cars of its own, by buying or borrowing, or by leasing from a private car line company. So this objection also is premature.

## VI.

**The order afforded sufficient time for compliance.**

The order was entered on May 11, 1915, to be effective on August 15, 1915 (R. 35, 36). From the answer of the Crew-Levick Company, intervenor, it appears that the effective date of the order was postponed for ninety days, or until November 15, 1915 (R. 42, 43, 48). It appears in no way that the carrier could not have purchased, or leased, or built tank cars prior to that time if a *bona fide* effort had been made. The Commission suggested that the railroad may comply with the order by leasing a portion of the 13,000 tank cars owned by independent lines (R. 33). In absence of any effort by the carrier to observe the order, the objection again seems not available. Moreover, the duty to provide tank cars existed prior

to the date of the order, for the duty is imposed not by the order but by the statute.

### CONCLUSION.

The decree of the District Court should be reversed, with direction to dismiss the petition.

JOHN W. DAVIS,
*Solicitor General.*

ROBERT SZOLD,
*Attorney.*

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